



FEDERAL TRADE COMMISSION

[File No. 202 3179]

Resident Home, LLC; Analysis of Proposed Consent Order to Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed Consent Agreement; Request for Comment.

SUMMARY: The consent agreement in this matter settles alleged violations of federal law prohibiting unfair or deceptive acts or practices. The attached Analysis of Proposed Consent Order to Aid Public Comment describes both the allegations in the draft complaint and the terms of the consent order – embodied in the consent agreement – that would settle these allegations.

DATES: Comments must be received on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

ADDRESSES: Interested parties may file comments online or on paper by following the instructions in the Request for Comment part of the **SUPPLEMENTARY**

INFORMATION section below. Please write “Resident Home LLC; File No. 202 3179” on your comment, and file your comment online at <https://www.regulations.gov> by following the instructions on the web-based form. If you prefer to file your comment on paper, mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC-5610 (Annex D), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW, 5th Floor, Suite 5610 (Annex D), Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: Julia Solomon Ensor (202-326-2377), Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580.

SUPPLEMENTARY INFORMATION: Pursuant to Section 6(f) of the Federal Trade Commission Act, 15 U.S.C. 46(f), and FTC Rule 2.34, 16 CFR § 2.34, notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained at <https://www.ftc.gov/news-events/commission-actions>.

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. Write “Resident Home LLC; File No. 202 3179” on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the <https://www.regulations.gov> website.

Due to the COVID-19 pandemic and the agency’s heightened security screening, postal mail addressed to the Commission will be subject to delay. We strongly encourage you to submit your comments online through the <https://www.regulations.gov> website.

If you prefer to file your comment on paper, write “Resident Home; File No. 202 3179” on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC-5610 (Annex D), Washington, DC 20580; or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW, 5th Floor, Suite 5610 (Annex D), Washington, DC 20024. If possible, submit your paper comment to the Commission by courier or overnight service.

Because your comment will be placed on the publicly accessible website at <https://www.regulations.gov>, you are solely responsible for making sure your comment does not include any sensitive or confidential information. In particular, your comment should not include sensitive personal information, such as your or anyone else's Social Security number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also solely responsible for making sure your comment does not include sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any "trade secret or any commercial or financial information which . . . is privileged or confidential"—as provided by Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2)—including in particular competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled "Confidential," and must comply with FTC Rule 4.9(c). In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule 4.9(c). Your comment will be kept confidential only if the General Counsel grants your request in accordance with the law and the public interest. Once your comment has been posted on the <https://www.regulations.gov> website—as legally required by FTC Rule 4.9(b)—we cannot redact or remove your comment from that website, unless you submit a confidentiality request that meets the requirements for such treatment under FTC Rule 4.9(c), and the General Counsel grants that request.

Visit the FTC Website at <http://www.ftc.gov> to read this document and the news release describing the proposed settlement. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding, as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. For information on the Commission's privacy policy, including routine uses permitted by the Privacy Act, see <https://www.ftc.gov/site-information/privacy-policy>.

Analysis of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission ("FTC" or "Commission") has accepted, subject to final approval, an agreement containing a consent order from Resident Home LLC, also d/b/a Nectar Sleep, DreamCloud Sleep, Awara Sleep, Level Sleep, Bundle Living, 1771 Living, Cloverlane, Wovenly Rugs, Sleep Authority, and Home Well Designed, and Ran Reske ("Respondents"). The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments from interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make final the agreement's proposed order.

This matter involves Respondents' advertising of DreamCloud mattresses as of U.S. origin. According to the FTC's complaint, Respondents represented that DreamCloud mattresses were "proudly made with 100% USA-made premium quality materials." However, the complaint alleges that, in numerous instances, DreamCloud mattresses are wholly imported or incorporate significant imported materials. In all instances, DreamCloud mattresses are finished overseas. Based on the foregoing, the complaint

alleges that Respondents engaged in deceptive acts or practices in violation of Section 5(a) of the FTC Act.

The proposed consent order contains provisions designed to prevent Respondents from engaging in similar acts and practices in the future. Consistent with the FTC's Enforcement Policy Statement on U.S.-Origin Claims, Part I prohibits Respondents from making U.S.-origin claims for their products unless either: (1) the final assembly or processing of the product occurs in the United States, all significant processing that goes into the product occurs in the United States, and all or virtually all ingredients or components of the product are made and sourced in the United States; (2) a clear and conspicuous qualification appears immediately adjacent to the representation that accurately conveys the extent to which the product contains foreign parts, ingredients or components, and/or processing; or (3) for a claim that a product is assembled in the United States, the product is last substantially transformed in the United States, the product's principal assembly takes place in the United States, and United States assembly operations are substantial.

Part II prohibits Respondents from making any country-of-origin claim about a product or service unless the claim is true, not misleading, and Respondents have a reasonable basis substantiating the representation.

Parts III through V are monetary provisions. Part III imposes a judgment of \$753,300. Part IV includes additional monetary provisions relating to collections. Part V requires Respondents to provide sufficient customer information to enable the Commission to administer consumer redress, if appropriate.

Part VI is a notice provision requiring Respondents to identify and notify certain DreamCloud mattress purchasers of the FTC's action within 30 days after the issuance of the order, or within 30 days of the customer's identification, if identified later. Respondents are also required to submit reports regarding their notification program.

Parts VII through IX are reporting and compliance provisions. Part VII requires Respondents to acknowledge receipt of the order, to provide a copy of the order to certain current and future principals, officers, directors, and employees, and to obtain an acknowledgement from each such person that they have received a copy of the order. Part VIII requires Respondents to file a compliance report within one year after the order becomes final and to notify the Commission within 14 days of certain changes that would affect compliance with the order. Part IX requires Respondents to maintain certain records, including records necessary to demonstrate compliance with the order. Part X requires Respondents to submit additional compliance reports when requested by the Commission and to permit the Commission or its representatives to interview Respondents' personnel.

Finally, Part XI is a "sunset" provision, terminating the order after twenty (20) years, with certain exceptions.

The purpose of this analysis is to aid public comment on the proposed order. It is not intended to constitute an official interpretation of the proposed order or to modify its terms in any way.

By direction of the Commission, Commissioners Phillips and Wilson dissenting.

April J. Tabor,

Secretary.

**Joint Statement of Chair Lina M. Khan, Commissioner Rohit Chopra, and
Commissioner Rebecca Kelly Slaughter**

The parties named in this matter are no strangers to the Commission. In 2018, the FTC finalized a settlement with Nectar Brand LLC (also doing business as DreamCloud, LLC, and DreamCloud Brand LLC) ("Nectar") related to false "Assembled in USA" claims about the company's wholly imported mattresses. Shortly after that settlement,

CEO Ran Reske and Nectar’s other officers reorganized the company and its subsidiaries under a new ultimate parent entity, Resident Home LLC (“Resident”). Despite the reorganization and being under active compliance monitoring as part of the 2018 Nectar order, old habits die hard. Misleading made in USA (“MUSA”) claims continued to appear on the website of DreamCloud Brand LLC in 2019 and 2020, contrary to Reske’s statements made under penalty of perjury as part of required compliance reports. Today’s action sends an unambiguous message about the importance of complying with prior Commission orders. In addition to injunctive provisions, the proposed settlement contains monetary relief of \$753,300 and requires Resident to notify consumers of the FTC’s action. Together with the Commission’s recent MUSA rule¹, these remedies signal to businesses that MUSA abuses—which harm both consumers and honest competitors—will not be tolerated by the FTC. Our dissenting colleagues suggest that the proposed settlement is not authorized by statute. This is incorrect. The settlement is squarely within the Commission’s statutory authority. The dissent contends that the monetary relief in this settlement goes beyond what is permitted by Section 19 of the FTC Act. In fact, Section 19 expressly authorizes payment of redress and damages. The dissent attempts to sidestep this clear statutory authority by narrowly equating “damages” with restoration of money to particular consumers. However, such an interpretation runs contrary to the standard legal meaning of the term.² Furthermore, MUSA fraud can result in significant consequential damages, both to consumers and, especially, to honest businesses that lose

¹ See Press Release, Fed Trade Comm’n, FTC Issues Rule to Deter Rampant Made in USA Fraud (July 1, 2021), <https://www.ftc.gov/news-events/press-releases/2021/07/ftc-issues-rule-deter-rampant-made-usa-fraud>.

² See Rohit Chopra and Samuel Levine, The Case for Resurrecting the FTC Act’s Penalty Offense Authority, U. PA. L. REV. (forthcoming), fn. 37, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3721256 (“Black’s Law Dictionary defines consequential damages as ‘[l]osses that do not flow directly and immediately from an injurious act but that result indirectly from the act.’ DAMAGES, Black’s Law Dictionary (11th ed. 2019). We have been unable to identify a Section 19 matter where the FTC pursued damages, which is traditionally understood to be a legal remedy rather than an equitable remedy. Unlike equitable relief, damages can conceivably capture a broad range of harms, including indirect consequences of deception. As the FTC faces threats to its authority to seek equitable relief, the agency should consider pursuing this alternative form of relief in more cases.”).

out on sales. Against this backdrop, the proposed monetary relief, far from being a penalty of the sort prohibited by Section 19, is reasonable and well within the Commission’s legal authority. The dissent also presents a highly restrictive reading of the types of relief “explicitly authorized” by Section 19. But despite admonishing the Commission “that the words of a statute matter”, the dissent misses the statute’s language expressly stating that the relief available is not limited to the types explicitly enumerated (“Such relief may include, but shall not be limited to...”). Thus, even if the dissent were not mistaken about what is covered under “damages”, the relief obtained here still would not be foreclosed by the statutory language. Finally, even if the dissent were not incorrect about the extent of the relief the Commission could obtain under Section 19 at trial, it would still be wrong about the lawfulness of the relief obtained in this settlement. Supreme Court precedent makes clear that federal courts may approve settlements that include relief beyond what could have been awarded at trial.³ We agree with our dissenting colleagues that Congress should act swiftly to restore our Section 13(b) authority, and like them we have directly urged Congress to do so.⁴ But, as we have also consistently emphasized, the FTC needs to

³ *Firefighters v. City of Cleveland*, 478 U.S. 501, 525 (1986) (“a federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial”).

⁴ See Press Release, Fed. Trade Comm’n, FTC Asks Congress to Pass Legislation Reviving the Agency’s Authority to Return Money to Consumers Harmed by Law Violations and Keep Illegal Conduct from Reoccurring (Apr. 27, 2021), <https://www.ftc.gov/news-events/press-releases/2021/04/ftc-asks-congress-pass-legislation-reviving-agencysauthority>. See also Hearing on “Strengthening the Federal Trade Commission’s Authority to Protect Consumers”: Before the U.S. Senate Committee on Commerce, Science, and Transportation, Prepared Oral Statement of FTC Commissioner Noah Joshua Phillips, Fed. Trade Comm’n (Apr. 20, 2021), https://www.ftc.gov/system/files/documents/public_statements/1589176/formatted_prepared_statement_0420_senate_hearing_42021_final.pdf; Hearing on “Strengthening the Federal Trade Commission’s Authority to Protect Consumers”: Before the U.S. Senate Committee on Commerce, Science, and Transportation, Oral Statement of Commissioner Christine S. Wilson, Fed. Trade Comm’n (Apr. 20, 2021), https://www.ftc.gov/system/files/documents/public_statements/1589180/opening_statement_final_for_postingrevd.pdf; Hearing on “Strengthening the Federal Trade Commission’s Authority to Protect Consumers”: Before the U.S. Senate Committee on Commerce, Science, and Transportation, Opening Statement of Acting Chairwoman Rebecca Kelly Slaughter, Fed. Trade Comm’n (Apr. 20, 2021), https://www.ftc.gov/system/files/documents/public_statements/1589184/opening_statement_april_20_senate_oversight_hearing_420_final.pdf; Hearing on “Strengthening the Federal Trade Commission’s Authority to Protect Consumers”: Before the U.S. Senate Committee on Commerce, Science, and Transportation, Prepared Opening Statement of Commissioner Rohit Chopra, Fed. Trade Comm’n (Apr. 20, 2021), https://www.ftc.gov/system/files/documents/public_statements/1589172/final_chopra_opening_statement_for_senate_commerce_committee_20210420.pdf.

use all its tools to protect consumers and competition within the bounds of our existing authority.⁵ While Congress works to deliver a Section 13(b) fix, Section 19 and other extant statutory tools⁶ will be crucial in allowing the FTC to obtain monetary redress in consumer protection cases.

⁵ See, e.g., Joint Statement of Commissioner Rohit Chopra and Commissioner Rebecca Kelly Slaughter Concurring in Part, Dissenting in Part, In the Matter of Flo Health, Inc., Fed. Trade Comm’n (Jan. 13, 2021), https://www.ftc.gov/system/files/documents/public_statements/1586018/20210112_final_joint_rmrks_statement_on_flo.pdf; Remarks of Commissioner Rebecca Kelly Slaughter, FTC Data Privacy Enforcement: A Time of Change, Cybersecurity and Data Privacy Conference, New York University School of Law (Oct. 16, 2020), https://www.ftc.gov/system/files/documents/public_statements/1581786/slaughter_-_remarks_on_ftc_data_privacy_enforcement_-_a_time_of_change.pdf.

⁶ For instance, violators of administrative orders are subject to penalties and various forms of relief under Section 5(l) of the FTC Act. See Statement of Rohit Chopra In the Matter of Resident Home LLC Commission File No. 202 3179, Oct. 8, 2021.

Statement of Commissioner Rohit Chopra

Wow, that was fast. Soon after the Federal Trade Commission “punished” Nectar Sleep through a no-money, no-fault order, the company and its affiliates clearly realized the FTC wasn’t serious about Made in USA fraud, so here we are again.

FTC orders are not suggestions, but many bad actors view them as such.¹ And when companies do not adhere to agency orders, it is often a sign of more serious problems.² Violations of FTC orders are punishable with civil penalties and a broad range of other relief.

The Commission is proposing to settle the matter by ordering Resident Home, Nectar Sleep’s new parent company, to pay \$753,300. The Commission’s complaint also charges Resident’s CEO, Ran Reske, with serious wrongdoing. Reske signed a report, under penalty of perjury, stating that Resident Home had removed all covered Made in USA claims from its subsidiaries’ websites and that Resident had never made Made in USA claims about its DreamCloud mattress. This was false.

The proposed settlement binds Nectar Sleep, as well as its new parent company, ensuring that any corporate musical chairs will not allow the company to dodge the FTC’s order. The proposed order also requires the companies to provide notice to consumers who purchased a mattress while the false claims appeared.

¹ This follows a slew of other repeat offenders when it comes to Made in USA requirements, a clear demonstration of the need for the policy shift the FTC is now making. See Rohit Chopra, Commissioner, Fed. Trade Comm’n., Statement of Commissioner Rohit Chopra Regarding the Notice of Proposed Rulemaking on Made in USA (June 22, 2020), https://www.ftc.gov/system/files/documents/public_statements/1577107/p074204musachoprastatementrev.pdf. See e.g., *In the Matter of Williams-Sonoma, Inc.*, No. C-4724 (July 2020), <https://www.ftc.gov/system/files/documents/cases/2023025c4724williams-sonomaorder.pdf>. The Commission opened an investigation but, after some behavior alterations by Williams-Sonoma, the 2018 investigation was closed, only to be renewed in 2020 when Williams-Sonoma was at it again. See also *U.S. v. iSpring Water Systems, LLC, et al.*, No. 1:16-cv-1620-AT (N.D. Ga. 2019). After making false claims that its water filtration systems were made in the United States and entering into an administrative order with the FTC in 2017, iSpring went back to making false claims only a year later, triggering the violation of the 2017 order.

² Rohit Chopra, Comm’r, Fed. Trade Comm’n. Repeat Offenders Memo (May 14, 2018), https://www.ftc.gov/system/files/documents/public_statements/1378225/chopra_-_repeat_offenders_memo_5-14-18.pdf.

Commissioner Slaughter has rightfully noted that the Commission must use all of its tools to protect the marketplace and make victims whole. This case is no exception. The settlement is reasonable and squarely within the Commission's legal authority.

Disguised Opposition

My dissenting colleagues purport that this proposed action – which was agreed to by Resident Home and Reske – is not authorized by statute. Their arguments fail on policy and legal grounds.

Commissioners Phillips and Wilson have consistently supported no-money, no-fault settlements, even in cases of egregious Made in USA fraud.³ I understand that, as a matter of policy, they do not support serious consequences for Made in USA fraud and have expressed support for the longstanding permissive policy of the past.⁴ However, their dissenting statement disguises this policy opposition as an argument about the Commission's legal authority. There are several pieces of evidence to suggest that Commissioners Phillips and Wilson's resistance is based on policy grounds, not on legal grounds.

First, Commissioners Phillips and Wilson argue they must have express statutory authorization to accept monetary remedies in settlements. However, less than two months after the Supreme Court ruled that the FTC cannot obtain monetary relief in certain federal court actions, both Commissioners Phillips and Wilson voted for an \$18 million order to settle a complaint brought under Section 13(b) of the FTC Act – the exact authority the

³ See Press Release, Fed Trade Comm'n, FTC Approves Final Consents Settling Charges that Hockey Puck Seller, Companies Selling Recreational and Outdoor Equipment Made False 'Made in USA' Claims (Apr. 17, 2019), <https://www.ftc.gov/news-events/press-releases/2019/04/ftc-approves-final-consentssettling-charges-hockey-puck-seller>; *In the Matter of Sandpiper Gear of California, Inc. et al.*, No. 182-3095, <https://www.ftc.gov/enforcement/cases-proceedings/182-3095/sandpiper-california-inc-et-al-matter>; *In the Matter of Underground Sports d/b/a Patriot Puck, et al.*, No. 182-3113 (Apr. 2019), <https://www.ftc.gov/enforcement/casesproceedings/182-3113/underground-sports-inc-doing-business-patriot-puck-et-al>.

⁴ *Id.*

Supreme Court explicitly ruled against the FTC on.⁵ This not the only example where Commissioners Phillips and Wilson have agreed to settle complaints with remedies that are not specifically enumerated by statute.

To further disguise the nature of their opposition, Commissioners Phillips and Wilson assert that the Commission is accepting monetary remedies in an administrative settlement not permitted by Section 19 of the Federal Trade Commission Act. In reality, Section 19 of the FTC Act expressly authorizes the payment of redress and damages. Consequential damages in Made in USA fraud can be considerable, particularly when it comes to harms to law-abiding businesses whose sales were siphoned. In settlements, parties can save time and resources by making the best estimates – adjusted for risk – on the right resolution. It would have been costly to specifically identify each harmed consumer and business, but it is clear the proposed monetary relief is reasonable, given our legal authority.

In addition, Commissioners Phillips and Wilson imply that to obtain the proposed remedies, the Commission must file multiple complaints in our administrative tribunal and in federal court. However, Commissioner Phillips and Wilson know that the Commission does not regularly prosecute the same conduct in multiple fora. Commissioners need not concurrently charge an entity for the same consumer protection violation of law in its administrative tribunal and in federal court, even when it may be authorized, like in civil penalty actions under Section 5(l).

The facts and evidence clearly show that DreamCloud violated an administrative order, triggering penalties and a broad range of relief under Section 5(l) of the FTC Act. Even if Section 19 of the FTC Act did not authorize damages, it is perfectly appropriate

⁵ See Press Release, Fed Trade Comm'n, LendingClub Agrees to Pay \$18 Million to Settle FTC Charges (July 14, 2021), <https://www.ftc.gov/news-events/press-releases/2021/07/lendingclub-agrees-pay-18-million-settle-ftccharges>. Given the alternative paths the Commission could have pursued to address the conduct at hand, I believe the settlement was appropriate even in spite of the Supreme Court's ruling. Indeed, the Commission's proposed stipulated judgment was entered by the court.

for the Commission to settle all of these claims at once, rather than pursue an additional action for civil penalties. It is obvious that today's proposed action is legally sound. If Commissioners Phillips and Wilson are voting against the proposed settlement because of their preference for no-consequences settlements in Made in USA fraud matters, then they should be upfront with the public and state so plainly.

Conclusion

The FTC has a troubling history of strong-arming small and independent business owners – including church organists⁶ and skating teachers⁷ – into settlements, while allowing those who repeatedly break the law to escape unscathed,⁸ often with the help of high-priced FTC alumni. In this matter, the Commission is proposing a settlement to hold accountable a repeat offender represented by a sophisticated law firm. I am pleased that the agency's abusive and inappropriate double standard is starting to fade away.

Finally, for decades, there was a bipartisan consensus among FTC Commissioners that Made in USA fraud should not be penalized. In 1994, Congress granted the FTC strong tools to combat Made in USA fraud, but Commissioners essentially ignored them. Fortunately, that era is also over.

Effective August 13, 2021, individuals and companies engaging in Made in USA fraud, including first-time offenders, will be subject to stricter sanctions under the FTC's Made in USA Labeling Rule. I hope my colleagues will fully support enforcement actions to hold bad actors accountable under this rule. The families and honest businesses – long ignored by past Commissioners – are counting on us to live up to the law.

⁶ *In the Matter of American Guild of Organists*, Fed. Trade Comm'n, <https://www.ftc.gov/enforcement/casesproceedings/151-0159/american-guild-organists>.

⁷ *In the Matter of Professional Skaters Association, Inc.*, Fed. Trade Comm'n, <https://www.ftc.gov/enforcement/cases-proceedings/131-0168/professional-skaters-association-inc-matter>.

⁸ See e.g. Devin Coldewey, 9 reasons the Facebook FTC settlement is a joke, TECHCRUNCH (July 24, 2019), <https://techcrunch.com/2019/07/24/9-reasons-the-facebook-ftc-settlement-is-a-joke/>.

Dissenting Statement of Commissioners Noah Joshua Phillips and Christine S.

Wilson

That didn't take long. Soon after the Supreme Court unanimously rebuked the Federal Trade Commission for seeking monetary remedies not permitted by Section 13(b) of the FTC Act¹—remedies that, in fairness to the agency, were blessed by appellate courts for decades²—the Commission now votes to accept monetary remedies not permitted by Section 19.

We commend staff for their diligent work on this case, and remain committed to continued Made in the U.S.A. enforcement.³ But we believe that the monetary redress in this case exceeds our authority, and so we respectfully dissent.

In 2018, the Commission entered an administrative order against Nectar Brand LLC, also d/b/a Nectar Sleep, DreamCloud LLC, and DreamCloud Brand LLC (“Nectar Order”) and its successors and assigns for making “Assembled in USA” claims for wholly-imported mattresses. Despite being under order, over at least two periods between December 2018 and June 2020, the Complaint alleges that Nectar deceptively advertised DreamCloud mattresses as “proudly made with 100% USA-made premium quality materials”.

Since entry of the Nectar Order, the 2018 Respondent underwent several changes to its corporate structure. In 2019, Resident Home LLC was created as the parent company of Nectar Brand LLC and DreamCloud Brand LLC. We do not have reason to believe that

¹ *AMG Capital Management, LLC v. FTC*, 141 S. Ct. 1341 (2021).

² See, e.g., *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1112-1113 (9th Cir. 1982); *FTC v. Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1314-1315 (8th Cir. 1991); *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 365 (2d Cir. 2011).

³ See, *In the matter of Chemence, Inc.*, File No. X1600321 (Feb. 2021), <https://www.ftc.gov/enforcement/casesproceedings/X160032/chemence-inc>; *In the matter of Gennex Media*, File No. 2023122 (Apr. 2021), <https://www.ftc.gov/enforcement/cases-proceedings/2023122/gennex-media-matter>; *In the matter of Williams-Sonoma, Inc.*, File No. 2023025 (July 2020), <https://www.ftc.gov/enforcement/cases-proceedings/202-3025/williams-sonoma-inc-matter>. Unlike Commissioners Chopra and Slaughter, we have supported every Made in U.S.A. enforcement action brought during our tenure.

Resident Home LLC is a successor or assign of Nectar Brand LLC and is covered by the Nectar Order.

This state of play left the Commission with at least two choices. It could choose to pursue an order enforcement action in federal court and seek civil penalties.⁴

Alternatively, or in addition to taking action against Nectar Brand, LLC, it could choose to pursue a de novo administrative action and seek a new order that would cover the company, its corporate parent Resident Home LLC, and Resident Home's CEO Ran Reske, while ensuring that any future violations would result in a civil penalty. While valid justifications support any of these approaches, the Commission ultimately determined that seeking a new, broader order would best protect consumers.

The Commission statement and Commissioner Chopra's separate statement assert that evidence clearly showed that DreamCloud violated an administrative order. Despite the majority's paean to the value of vindicating Commission orders, we do not plead an order violation in the complaint. We support the FTC's longstanding view that order obligations should reflect pleadings.

In choosing to proceed only administratively, the Commission gave up its ability to obtain civil penalties; but it can still seek redress on behalf of injured consumers pursuant to Section 19 of the FTC Act. While the process is somewhat convoluted, Section 19 permits the Commission to secure certain monetary relief, including, *inter alia*, "the refund of money" and "the payment of damages".⁵ As the legislative history underscores, the purpose of this relief is to allow the Commission to act "to make specific consumers whole...".⁶ Section 19 allows the Commission to obtain refunds for specific,

⁴ The Commission statement and Commissioner Chopra's separate statement assert that evidence clearly showed that DreamCloud violated an administrative order. Despite the majority's paean to the value of vindicating Commission orders, we do not plead an order violation in the complaint. We support the FTC's longstanding view that order obligations should reflect pleadings.

⁵ 15 U.S.C. 57b(b).

⁶ S. Rept. 93-151, 93d Cong., 2d Sess., at 27-28 (May 14, 1973).

identified injured consumers.⁷ It expressly precludes “the imposition of any exemplary or punitive damages”.⁸ Under Section 19, the FTC does not have authority to obtain disgorgement of ill-gotten gains, another (more penal⁹) form of equitable monetary relief.

Despite these clear limitations, the Commission’s proposed order includes monetary redress of \$753,300, with any remainder not used for redress to be disgorged to the Treasury. The complaint does not include details that would help the public understand how the Commission arrived at this amount, and we are not at liberty to reveal non-public information. But our view of the facts is that the figure obtained far exceeds any injury suffered by those consumers who saw the deceptive statement and purchased a DreamCloud mattress or any reasonable estimate of damages. The majority points to language in Section 19 that also authorizes redress of injury to “other persons” (besides consumers) resulting from the unlawful practices alleged.¹⁰ We have seen no evidence of such harm in this matter. No one quibbles that the amount of money here exceeds any reasonable estimate of injury.¹¹ It might plausibly be consistent with a penalty or with the disgorgement of ill-gotten gains, but we have no authority to obtain such relief under

⁷ See *FTC v. Figgie Int’l, Inc.*, 994 F.2d 595 (9th Cir. 1993).

⁸ 15 U.S.C. 57b(b).

⁹ See *Liu v. Securities and Exchange Commission*, 140 S. Ct. 1936 (2020).

¹⁰ 15 U.S.C. 57b(b) (“The court...shall have jurisdiction to grant such relief as the court finds necessary to redress injury to consumers or other persons, partnerships, and corporations resulting from the rule violation or the unfair or deceptive act or practice, as the case may be.”); see also Joint Statement of Commissioner Slaughter, Chair Khan, and Commissioner Chopra *In the Matter of Resident Home*, 2, FN4 File No. 202317.

¹¹ In his separate statement, Commissioner Chopra misrepresents our position in *LendingClub*. In that case, the Commission would have been entitled to consumer redress for injuries under Section 19. In *LendingClub*, unlike here, the settlement amount was not punitive; it reflected the monetary harm suffered by consumers. See, *In the matter of LendingClub Corporation*, File No. 1623088 (July 2021), <https://www.ftc.gov/enforcement/casesproceedings/162-3088/federal-trade-commission-v-lendingclub-corporation>.

Section 19.¹² The Commission makes clear in its statement that the purpose of the monetary relief in question is to penalize, not to make consumers whole.¹³

The Supreme Court handed down its decision in *AMG Capital Management, LLC v. FTC* in April,¹⁴ and made clear that the words of a statute matter. Those words trump the policy preferences of commissioners. That decision should have been a wake-up call, a reminder to the Commission that, no matter how egregious the conduct or righteous our cause, the Commission is not entitled to go beyond the bounds of what the law permits. If we continue to flout the limits of our authority, the Commission should fully expect additional rebukes from the courts.

The *AMG* decision has significantly impacted the ability of the FTC to pursue wrongdoers and remediate law violations through the imposition of monetary relief. So we reiterate our call to Congress to pass legislation to restore the ability of the FTC to seek monetary remedies under Section 13(b) of the FTC Act in appropriate circumstances. But the law says what it says, and we do not support using the cloak of a settlement to overstep the authority we have.¹⁵

¹² The majority is correct that Section 19 permits “damages”. The majority, though, is not entitled to its own facts. The facts alleged in the complaint and Analysis to Aid Public Comment provide no basis for a Section 19 damages remedy of this amount. Although we cannot share the underlying analysis with the reader, the monetary remedy far exceeds any reasonable estimate of Section 19 damages. As the majority makes clear in the Commission statement, it is assessing a penalty under cover of Section 19.

¹³ In his separate statement, Commissioner Chopra also claims that we do not support consequences for Made in the U.S.A. fraud. By that logic, Commissioner Chopra’s votes against privacy enforcement in cases like *Facebook* and *Google/YouTube* show his enthusiasm for their business models and distaste for enforcement against large technology platforms. The issue here is the Commission trying to eat its Section 19 cake and have its civil penalties too. We cannot do both, however we feel about policy. See Statement of Rohit Chopra *In the Matter of Resident Home LLC*, Commission File No. 202317. See also, Dissenting Statement of Commissioner Rohit Chopra *In re: Facebook, Inc.*, Commission File No. 1823109 (July 24, 2019), https://www.ftc.gov/system/files/documents/public_statements/1536911/chopra_dissenting_statement_facebook_7-24-19.pdf; Dissenting Statement of Commissioner Rohit Chopra *In the Matter of Google LLC and YouTube, LLC*, Commission File No. 1723083 (Sep. 4, 2019), https://www.ftc.gov/system/files/documents/public_statements/1542957/chopra_google_youtube_dissent.pdf.

¹⁴ *AMG Capital Mgmt., LLC v. FTC*, 141 S. Ct. 1341 (2021).

¹⁵ The majority is correct that, as a practical matter, the government has the ability to extort that to which it is not entitled under law. As we have said on other occasions, though, just because we can does not mean that we should. Joint Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson, *U.S. v. iSpring Water Systems, LLC*, Commission File No. C4611 (Apr. 12, 2019), https://www.ftc.gov/system/files/documents/public_statements/1513499/ispring_water_systems_llc_c4611_modified_joint_statement_of_commissioners_phillips_and_wilson_4-12.pdf.

If the goal in this case were to maximize money paid by the Respondents as punishment and to deter others from engaging in similar conduct, the Commission was free to enforce the original Nectar Order and seek civil penalties. That was the road not taken. In choosing this road, with a new and broader order, the Commission is obligated to limit monetary relief to the amount necessary to redress injury, as explicitly authorized by Section 19. Because this settlement exceeds those clearly delineated bounds, we must respectfully dissent.

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